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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

TAYLOR SMART AND MICHAEL HACKER,
Individually and on Behalf of All
Those Similarly Situated,
Plaintiffs,
v.
NATIONAL COLLEGIATE ASSOCIATION, an
unincorporated association,
Defendant.

JOSEPH COLON, SHANNON RAY, KHALA
TAYLOR, PETER ROBINSON, KATHERINE
SEBBAME, and PATRICK MEHLER,
individually and on behalf of all
those similarly situated,
Plaintiffs,
v.
NATIONAL COLLEGIATE ATHLETIC
ASSOCIATION, an unincorporated
association,
Defendant.

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No. 2:22-cv-02125 WBS KJN

Chief United States Magistrate
Judge Kendall J. Newman (KJN)
*Assigned for non-dispositive
matters*

STIPULATED PROTECTIVE ORDER

No. 1:23-cv-00425 WBS KJN

Chief United States Magistrate
Judge Kendall J. Newman (KJN)
*Assigned for non-dispositive
matters*

1
2 **I. INTRODUCTION**

3 The parties, by their undersigned counsel, pursuant to Fed.
4 R. Civ. P. 26(c)(1), hereby stipulate to the following
5 provisions.

6 **II. SCOPE OF PROTECTED INFORMATION**

7 In the course of discovery in this action, the parties may
8 be required to produce information that constitutes, in whole or
9 in part, protected information such as trade secrets, non-public
10 research and development, commercial or financial information, or
11 other information that may cause harm to the Producing Party or a
12 non-party. The parties anticipate production of the following
13 categories of protected information:
14

15 A. "Confidential" information:

- 16 1. Information (regardless of how it is generated,
17 stored, or maintained) or tangible things that
18 qualify for protection under Fed. R. Civ. P. 26(c);
19
20 2. Information protected from disclosure by statute;
21
22 3. Information that reveals trade secrets;
23
24 4. Research, technical, commercial, or financial
25 information that the party has maintained as
26 confidential;
27
28 5. Medical information and protected health information
concerning any individual;

1 6. Personal identifying information of any person who is
2 not a party to this action, including absent class
3 members;

4 7. Any information whose disclosure would cause severe
5 competitive harm to the Designating Party if
6 disclosed;

7 8. Personnel or employment records of a person who is
8 not a party to this action,

9 9. Education records concerning any individual; and

10 10. Other information the disclosure of which would
11 breach a legal or contractual obligation.

12
13 B. "Confidential" Information under this order does not
14 include any information that

15 1. is publicly available at the time of disclosure and
16 became publicly available through lawful means and
17 without the violation of any court orders;

18 2. becomes publicly available after disclosure through
19 no fault of the Receiving Party (defined below); or

20 3. the Receiving Party lawfully obtains at a later date
21 from a third party without restriction as to
22 disclosure.

23
24
25 C. "Attorneys' Eyes Only" information:

26 1. Documents, testimony, or information that contains,
27 or is reasonably believed to contain, or is claimed
28 by another party to contain education records defined

1 by the Family Educational Rights and Privacy Act, 20
2 U.S.C. § 1232g, and any regulations passed pursuant
3 to that Act by the Department of Education or any
4 other federal agency ("FERPA Records") of any student
5 who has not consented to the disclosure of such
6 records; and
7

8 2. Other non-public, extremely sensitive confidential
9 information, disclosure of which the Designating
10 Party believes in good faith would create a
11 substantial risk of serious financial, reputational,
12 or other harm, or a serious violation of a privacy
13 interest that could not be avoided by less
14 restrictive means.
15

16 **III. DESIGNATION OF PROTECTED INFORMATION**

17 A. Scope: This Order governs the production and handling
18 of any protected information in this action. Any party or non-
19 party who produces protected information in this action may
20 designate it as "Confidential" or "Attorneys' Eyes Only"
21 consistent with the terms of this Order. "Designating Party"
22 means the party or non-party who so designates the protected
23 information; "Receiving Party" means the party or non-party to
24 whom such information was produced or disclosed. Whenever
25 possible, the Designating Party must designate only those
26 portions of a document, deposition, transcript, or other material
27 that contain the protected information and refrain from
28

1 designating entire documents. Regardless of any designations
2 made hereunder, the Designating Party is not otherwise restricted
3 from use or disclosure of its protected information outside of
4 this action. In addition, any party may move to modify or seek
5 other relief from any of the terms of this Order if it has first
6 tried in writing and in good faith to resolve its needs or
7 disputes with the other party(ies) pursuant to the terms of this
8 Order and E.D. Cal. L.R. 251, and Fed. R. Civ. P. 26 and 37.

10 B. Application to Non-Parties: Before a non-party is given
11 copies of designated information as permitted hereunder, it must
12 first sign the acknowledgment to be bound to these terms that is
13 attached hereto as Exhibit A; if it fails to do so, the parties
14 to this action must resolve any such dispute before making
15 disclosure of designated information as permitted hereunder to
16 the non-party. If a non-party wishes to make designations
17 hereunder, it must first sign the acknowledgment to be bound to
18 these terms that is attached hereto as Exhibit A.

20 C. Timing and Provisional Protection: Designations may be
21 made at any time. To avoid potential waiver of protection
22 hereunder, the Designating Party should designate information at
23 the time of production or disclosure, including on the record
24 during the taking of any testimony. Deposition testimony will be
25 deemed provisionally protected for a period of 15 days after the
26 transcript is released to the parties by the court reporter,
27 although the parties may agree at any time to different timelines
28

1 of provisional protection of information as Confidential or
2 Attorneys' Eyes Only as part of one or more specific depositions.
3 To retain any designations beyond the provisional period, a
4 Designating Party must designate specific pages and lines of
5 deposition testimony before the provisional period has expired.
6 Such designations must be made in writing so that all counsel and
7 court reporters may append the designation to all copies of the
8 transcripts.
9

10 D. Manner of Designation: Information may be designated
11 hereunder in any reasonable manner or method that notifies the
12 Receiving Party of the designation level and identifies with
13 specificity the information to which the designation applies. If
14 made verbally, the Designating Party must promptly confirm in
15 writing the designation. Whenever possible, the Designating
16 Party should stamp, affix, or embed a legend of "CONFIDENTIAL" or
17 "ATTORNEYS' EYES ONLY" on each designated page of the document or
18 electronic image.
19

20 **IV. CHALLENGES TO DESIGNATED INFORMATION**

21 In the event that a Receiving Party disagrees at any time
22 with any designation(s) made by the Designating Party, the
23 Receiving Party must first try to resolve such challenge in good
24 faith on an informal basis with the Designating Party pursuant to
25 E.D. Cal. L.R. 251 and Fed. R. Civ. P. 37. The Receiving Party
26 must provide written notice of the challenge and the grounds
27 therefor to the Designating Party, who must respond in writing to
28

1 the challenge within 15 days. At all times, the Designating
2 Party carries the burden of establishing the propriety of the
3 designation and protection level. Unless and until the challenge
4 is resolved by the parties or ruled upon by the Court, the
5 designated information will remain protected under this Order and
6 shall remain Confidential or Attorneys' Eyes Only as designated.
7 The failure of any Receiving Party to challenge a designation
8 does not constitute a concession that the designation is proper
9 or an admission that the designated information is otherwise
10 competent, relevant, or material.
11

12 **V. LIMITED ACCESS/USE OF PROTECTED INFORMATION**

13 A. Restricted Use: Information that is produced or
14 exchanged in the course of this action and designated under this
15 Order may be used solely for the preparation, trial, and any
16 appeal of this action, as well as related settlement
17 negotiations, and for no other purpose, without the written
18 consent of the Designating Party. No designated information may
19 be disclosed to any person except in accordance with the terms of
20 this Order. All persons in possession of designated information
21 agree to exercise reasonable care with regard to the custody,
22 use, or storage of such information to ensure that its
23 confidentiality is maintained. This obligation includes, but is
24 not limited to, the Receiving Party providing to the Designating
25 Party prompt notice of the receipt of any subpoena that seeks
26 production or disclosure of any designated information and
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1 consulting with the Designating Party before responding to the
2 subpoena. Any use or disclosure of Confidential or Attorneys'
3 Eyes Only information in violation of the terms of this Order may
4 subject the disclosing person or party to sanctions.

5 B. Access to "Confidential" Information: The parties and
6 all persons subject to this Order agree that information
7 designated as "CONFIDENTIAL" may only be accessed or reviewed by
8 the following:
9

- 10 1. The Court, its personnel, and court reporters;
- 11 2. Outside counsel for any party in this action and
12 their employees who assist outside counsel in this
13 action and are informed of the duties hereunder;
- 14 3. The parties, including their agents and employees
15 who are assisting or have reason to know of this
16 action, so long as each such agent or employee has
17 signed the acknowledgment to be bound to these terms
18 that is attached hereto as Exhibit A;
- 19 4. Experts or consultants employed by the parties or
20 their counsel for purposes of this action, as well as
21 mock jurors, so long as each such expert, consultant
22 and mock juror has signed the acknowledgment to be
23 bound to these terms that is attached hereto as
24 Exhibit A;
- 25 5. Any mediators that the parties may engage in this
26 action or that the Court appoints, including
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1 supporting personnel, so long as such mediator or
2 supporting staff signs the acknowledgment to be bound
3 to these terms that is attached hereto as Exhibit A;

4 6. Vendors who provide litigation support services

5 (e.g., photocopying, videotaping, translating,
6 preparing exhibits or demonstrations, and processing,
7 organizing, storing, reviewing, categorizing, or
8 retrieving data in any form or medium) whose
9 representative signs the acknowledgement to be bound
10 to these terms that is attached hereto as Exhibit A;

11 7. Entities who provide insurance coverage to parties in

12 this case, so long as any personnel employed by the
13 insurance entity who is to be granted access to the
14 information sign the acknowledgment to be bound to
15 these terms that is attached hereto as Exhibit A;

16 8. Witnesses in the action to whom disclosure is

17 reasonably necessary, so long as such witnesses
18 signed the acknowledgement to be bound to these terms
19 that is attached as Exhibit A unless the Receiving
20 Party has a good faith basis to believe that the
21 witness was an author or recipient of the information
22 designed as "Confidential"; and

23 9. Other witnesses or persons with the Designating

24 Party's consent or by court order.
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1 C. Access to "Attorneys' Eyes Only" Designations: Because
2 designation of information as "Attorneys' Eyes Only" is more
3 restrictive on disclosure and may interfere with the discovery
4 process, such designations should be used only to the extent
5 necessary. The parties and all persons subject to this Order
6 agree that information designated as "ATTORNEYS' EYES ONLY" may
7 only be accessed or reviewed by the following:
8

- 9 1. The Court, its personnel, and court reporters;
- 10 2. Outside counsel for any party in this action and
11 their employees who assist outside counsel in this
12 action and are informed of the duties hereunder;
- 13 3. In-house counsel for each party and their employees
14 who assist in-house counsel, who sign the
15 acknowledgement to be bound to these terms that is
16 attached hereto as Exhibit A;
- 17 4. Any mediators that the parties may engage in this
18 action or that the Court appoints, including
19 supporting personnel, so long as such mediator or
20 supporting staff signs the acknowledgment to be bound
21 to these terms that is attached hereto as Exhibit A;
- 22 5. Experts or consultants employed by the parties or
23 their counsel for purposes of this action, as well as
24 mock jurors, so long as each such expert, consultant
25 or mock juror has signed the acknowledgement to be
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1 bound to these terms that is attached hereto as
2 Exhibit A;

3 6. Vendors who provide litigation support services
4 (e.g., photocopying, videotaping, translating,
5 preparing exhibits or demonstrations, and processing,
6 organizing, storing, reviewing, categorizing, or
7 retrieving data in any form or medium) whose
8 representative signs the acknowledgement to be bound
9 to these terms that is attached hereto as Exhibit A;

10 7. Witnesses at deposition for which the Receiving Party
11 has a good faith basis to believe that the witness
12 was an author or recipient of the information
13 designated as "ATTORNEYS' EYES ONLY"; and

14 8. Other witnesses or persons to whom the Designating
15 Party agrees in advance of disclosure or by court
16 order and who sign the acknowledgement to be bound to
17 these terms that is attached hereto as Exhibit A.

18 D. Review of Witness Acknowledgments: At any time and for
19 any purpose, including to monitor compliance with the terms
20 hereof, any Designating Party may demand to review all copies of
21 Exhibit A in any Receiving Party's possession. The Receiving
22 Party must, within 3 business days of the demand, provide all
23 such copies to the Designating Party making the demand.
24 Notwithstanding the foregoing, if the Receiving Party has
25 retained an expert whose identity has not yet been disclosed to
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1 the Designating Party, the Receiving Party may generically
2 identify how many acknowledgments that it has in its possession
3 attributable to non-disclosed experts, whose acknowledgements
4 must later be provided contemporaneously with any reports issued
5 by one or more of said experts. If a Receiving Party is not
6 required to disclose the identity of any consulting experts, it
7 may not be compelled to produce any acknowledgments from those
8 experts to the Designating Party. However, if the Designating
9 Party provides to the Court evidence of breach of this Order via
10 unauthorized leak of designated information, the Court may
11 require an *in camera* production of all acknowledgments held by a
12 Receiving Party in order to determine breach and consider
13 enforcement of this Order.
14

15
16 E. Non-Waiver Effect of Designations: Neither the taking
17 of, nor the failure to take, any action to enforce the provisions
18 of this Order, nor the failure to object to any designation, will
19 constitute a waiver of any party's claim or defense in this
20 action or any other action or proceeding, including but not
21 limited to a claim or defense that any designated information is
22 or is not confidential, is or is not entitled to particular
23 protection, or embodies or does not embody information
24 protectable by law.
25

26 F. In-Court Use of Designated Information: If information
27 designated pursuant to this Order will or may be offered in
28 evidence at a hearing or trial, then the offering party must give

1 advance notice to the party or non-party that designated prior to
2 offering the information so that any use or disclosure may be
3 addressed in accordance with the Court's case-management or other
4 pre-trial order, or by a motion *in limine*.

5 Nothing in this Order shall be construed as a waiver by a party
6 of any objections that may be raised as to the admissibility at
7 trial of any evidentiary materials.

8
9 **VI. CLAW-BACK REQUESTS**

10 A. Failure to Make Designation: If, at any time, a party
11 or non-party discovers that it produced or disclosed protected
12 information without the appropriate designation, the Producing
13 Party shall promptly notify the Receiving Party within ten (10)
14 business days of the discovery of the disclosure in writing and
15 identify with particularity the information to be designated and
16 the level of designation (the claw-back notification). The
17 Receiving Party shall promptly destroy the document and may then
18 request substitute production of the newly-designated
19 information. Within 30 days of receiving the claw-back
20 notification, the Receiving Party must (1) certify to the
21 Designating Party it has destroyed all copies that it received,
22 made, and/or distributed; and (2) if it was practicably unable to
23 destroy any information because disclosures occurred while the
24 Receiving Party was under no duty of confidentiality under the
25 terms of this Order regarding that information, the Receiving
26 Party must reasonably provide as much information as practicable
27
28

1 to aid the Designating Party in protecting the information,
2 consistently with the Receiving Party's attorney-client, work-
3 product, and/or trial-preparation privileges.

4 B. Inadvertent Production of Privileged Information: If,
5 at any time, a party discovers that it produced information that
6 it reasonably believes is subject to protection under the
7 attorney/client, work-product, trial-preparation privileges, or
8 any other legally-recognized privilege, then it must promptly
9 notify each Receiving Party of the claim for protection, the
10 basis for it, amend its privilege log accordingly, and comply
11 with Fed. R. Civ. P. 26(b)(5). Whenever possible, the Producing
12 Party must produce substitute information that redacts the
13 information subject to the claimed protection. The Receiving
14 Party must thereupon comply with Fed. R. Civ. P. 26(b)(5) as to
15 the information subject to the claimed protection. The parties
16 must also comply with E.D. Cal. L.R. 251 before seeking Court
17 intervention to resolve any related dispute.

18
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20 **VII. DURATION/CONTINUED RESTRICTIONS**

21 A. Handling of Designated Information Upon Conclusion of
22 Action: Upon conclusion of this action, including all appeals,
23 the Designating Party(ies) is/are responsible for ensuring that
24 any party or person to whom the party shared or disclosed
25 designated information in this action returns or destroys all of
26 its copies that can be reasonably located, regardless of the
27 medium in which it was stored. Within 60 days after the later of
28

1 dismissal of this action or expiration of all deadlines for
2 appeal, the Receiving Party(ies) must certify to each Designating
3 Party that all designated information hereunder has been
4 destroyed by all parties and witnesses for whom that party is
5 responsible. No witness or party may retain designated
6 information that it received from any other party or non-party
7 under this Order; only counsel of record are the authorized
8 agents who may retain one copy for their respective legal files,
9 and who must also describe to the Designating Party the extra
10 steps taken to seal its legal file containing paper and/or
11 electronic copies of the designated information so that it is not
12 accessed, used, or disclosed inconsistently with the obligations
13 under this Order. This provision does not apply to the Court or
14 Court staff.

15
16
17 B. Continued Restrictions Under this Order: The
18 restrictions on disclosure and use of confidential information
19 survive the conclusion of this action.

20 **VIII. REQUESTS TO SEAL**

21 A. Filing Documents Under Seal: The parties shall comply
22 with E.D. Cal. L.R. 141 when filing material designated as
23 protected information pursuant to this order. Over-redaction of
24 documents sought to be maintained under seal may result in the
25 denial of a motion to seal.

26
27 B. Challenging "Confidential" or "Attorneys' Eyes
28 Only" Designations: Prior to the filing of any motion seeking to

1 challenge the designation of information as "Confidential" or
2 "Attorneys' Eyes Only" as set forth in Section IV above, the
3 parties will request a telephonic conference with the Magistrate
4 Judge to discuss the issue, following which the contesting party
5 may move for an order removing or altering the "Confidential" or
6 "Attorneys' Eyes Only" designation with regard to such
7 document(s).

8
9 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD:

10 DATED: September 29, 2023

11
12 MUNGER, TOLLES & OLSON LLP

13
14
15 By: /s/CAROLYN HOECKER LUEDTKE

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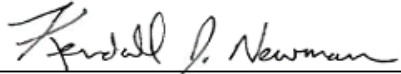
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ORDER

The court has reviewed the parties' stipulated protective order. (See 1:23-cv-00425-WBS-KJN at ECF No. 54; 2:22-cv-02125-WBS-KJN at ECF No. 46.) The stipulation comports with the relevant authorities and the court's applicable local rule. See L.R. 141.1. The court APPROVES the protective order, subject to the following clarification. Once an action is closed, "the court will not retain jurisdiction over enforcement of the terms of any protective order filed in that action." L.R. 141.1(f); see also, e.g., MD Helicopters, Inc. v. Aerometals, Inc., 2017 WL 495778 (E.D. Cal., Feb. 03, 2017) (noting that courts in the district generally do not retain jurisdiction for disputes concerning protective orders after closure of the case). Thus, despite the parties' agreement that jurisdiction extend beyond the end of this action, the court will not retain jurisdiction over this protective order once the case is closed.

Dated: October 16, 2023


KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

smar.2125

EXHIBIT A

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

TAYLOR SMART AND MICHAEL HACKER,
Individually and on Behalf of All
Those Similarly Situated,
Plaintiffs,
v.
NATIONAL COLLEGIATE ASSOCIATION, an
unincorporated association,
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No. 2:22-cv-02125 WBS KJN

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No. 1:23-cv-00425 WBS KJN

AGREEMENT TO BE BOUND BY PROTECTIVE ORDER

The undersigned acknowledges having been provided with and having
read the "Stipulated Protective Order" in this matter
("Protective Order"). The undersigned further agrees he/she (i)
is bound under the Protective Order, (ii) will comply with all of
its provisions, and (iii) is subject to the jurisdiction of the
Court for all purposes arising under the Protective Order,
including enforcement of its terms.

Dated: _____

By: _____

Print Name: